

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Public Telecommunications Association,)	
an Illinois not for profit corporation)	
)	Docket No. 15-0254
Petition to determine whether Illinois local)	
exchange carriers are in compliance with the)	
Illinois Public Utilities Act and Section 276)	
of the Communications Act of 1934.)	

**AT&T ILLINOIS' OPPOSITION
TO IPTA'S MOTION TO WITHDRAW PETITION**

Illinois Bell Telephone Company d/b/a AT&T Illinois d/b/a AT&T Wholesale ("AT&T Illinois") respectfully submits this Opposition to the Illinois Public Telecommunications Association's Motion to Withdraw its Petition ("Motion"). The Motion should be denied and the Commission should continue to a final decision granting AT&T Illinois' and Staff's motions to dismiss the Petition.

The IPTA seeks to withdraw its Petition in the face of an adverse Proposed Order – in other words, to quit while it's behind. But a petitioner has no absolute right to abandon a case after opposing parties have been forced to respond and have addressed the petitioner's claims on the merits. Rather, in those circumstances the Commission has discretion to decide whether to allow a voluntary dismissal. *Re Illinois-American Water Co.*, Ill. C.C. Dkt. No. 02-0517, 2003 WL 22319270, at *2 (Sept. 16, 2003) ("It is within the Commission's discretion to allow a party to voluntarily dismiss or withdraw a petition."). In this case and at this stage, when there has been full briefing as well as a detailed Proposed Order, there is no basis for allowing withdrawal.

A. The Commission Has Rejected Attempts to Voluntarily Dismiss a Case After an Adverse Proposed Order

It is improper and unfair to opposing parties to allow a petitioner to unilaterally withdraw its claims after a dispositive motion has been filed and briefed, especially when a

proposed order has been issued. Seeing the writing on the wall is no excuse for allowing a party that started a case to abandon ship after forcing others to bear the burden and expense of opposing it. As the Commission has recognized, “a trial court [or agency] should not be free to grant a dismissal where its sole purpose would be to avoid an unfavorable decision.” *Illinois-American Water Co.*, 2003 WL 22319270, at *2. Accordingly, the Commission has refused to grant requests for voluntary dismissal that came after issuance of an adverse proposed order. *Id.* (denying motion to withdraw filed after issuance of an adverse proposed order); *Cbeyond Commc’ns, LLC. v. Illinois Bell Tel. Co.*, Ill. C.C. Dkt. No. 10-0188. Order at 35 (July 7, 2011) (“The Commission will not grant Cbeyond’s Motion to Dismiss its Complaint. A dismissal at this point [after a proposed order had been issued] would be prejudicial to AT&T and appears to be an attempt on Cbeyond’s part to avoid an adverse ruling.”). The same result is proper here.

B. Voluntary Dismissal Is Not Required When Dispositive Motions Are Pending

Moreover, 735 ILCS 5/2-1009(b), which governs motions for voluntary dismissal in Illinois courts, states that a court can decide any dispositive motion (one that “could result in a final disposition of the cause”) that is filed prior to a motion for voluntary dismissal. The purpose of that provision, of course, is to prevent plaintiffs from dismissing their claims merely to avoid an adverse decision. *In re Air Crash Disaster at Sioux City, Iowa*, 259 Ill. App. 3d 231, 242, 631 N.E.2d 1302, 1311 (1st Dist. 1994). The same policy should apply here. If granted, AT&T Illinois’ and Staff’s motions to dismiss will “result in a final disposition of the cause.” Thus, just as a court could continue on in similar circumstances, the Commission should continue on and reach a final decision on those motions.

C. *Price v. Philip Morris* is Inapplicable Here

Although it does not explain its basis for seeking withdrawal in its Motion, IPTA appears to think that the Illinois Supreme Court's recent decision in *Price v. Philip Morris, Inc.*, 2015 IL 117687 (Nov. 4, 2015) requires it to take its claim to the Court of Appeals that in 2005 affirmed the Commission's denial of refunds. The *Price* decision, however, is both irrelevant and requires no such thing.

First, *Price* dealt with a motion filed in circuit court under 735 ILCS 5/2-1401 (concerning relief from final judgments). The IPTA did not file its Petition under Section 2-1401 nor does Section 2-1401 apply in Commission cases. Rather, the IPTA invoked the Commission's jurisdiction under 220 ILCS 5/10-108 (regarding complaints at the Commission) and 83 Ill. Admin. Code § 200.900 (dealing with reopening a case after the time for rehearing has passed). *See* Petition at 1. The Commission has full authority to administer those provisions and rule on the motions to dismiss the Petition. The Proposed Order properly applies those provisions by finding that various legal doctrines bar any complaint under Section 10-108 and that no facts or law have changed that would warrant reopening under Commission Rule 200.900. Proposed Order at 16-19. The decision in *Price* has nothing to do with the application of Section 10-108 and Rule 200.900, and is therefore irrelevant.

Second, even if Section 2-1401 could apply here, the IPTA misreads *Price*. In *Price* the plaintiff won at the trial court level but then lost in the reviewing court. The plaintiff later went back to the trial court, based on alleged new evidence, and effectively asked the *trial court* to reverse the *appellate court's* decision. *Price*, 2015 IL 117687 at ¶ 27. The Illinois Supreme Court said that was improper because a trial court has no authority to reverse an appellate court.

Id. at ¶¶ 27, 37-45. Rather, a party seeking to undo an appellate court decision must ask the appellate court to recall its mandate. *Id.*, ¶ 2.

This case presents the opposite situation. The IPTA did not win at the Commission and then lose on appeal, and it has not asked the Commission to reverse the appellate court. To the contrary, the IPTA lost at both the Commission and the Court of Appeals and its Petition asks *the Commission* to reverse *its own* prior decision in Docket 98-0195. *Price* states that when a party seeks vacatur of a decision rendered at the trial court level (which by analogy would be the Commission), that party should seek relief from the trial court itself, even if the trial court's decision has already been affirmed by a reviewing court:

When a petitioner seeks relief from the final judgment of a circuit court under section 2-1401, the petition must be filed in the circuit court in which the contested judgment was entered. . . . This is true even if the original circuit court judgment was affirmed on appeal before the petitioner filed the section 2-1401 petition.

Id., ¶¶ 25-26. Thus, even under *Price* nothing precludes the Commission from ruling on the IPTA's Petition, which asks *the Commission* to reverse *its own* final judgment in Docket No. 98-0195. (Of course, as AT&T Illinois, Staff, and the Proposed Order have shown, the Commission should deny that request.)

Given that nothing in *Price* requires the Commission to allow the IPTA to withdraw its Petition, it is clear that the IPTA is misreading *Price* in hopes of avoiding an adverse order here by switching to a different forum. There is no justification for allowing the IPTA to withdraw the Petition it filed that invoked the Commission's jurisdiction, relied on laws administered by the Commission, and challenged a Commission order, and on which the parties and Commission have spent their time and resources to litigate. *See Illinois-American Water Co.*, 2003 WL 22319270 at *2 (rejecting motion for voluntary dismissal where "the ALJ, Staff, [and AT&T Illinois], collectively, have spent valuable time and resources" on the case and "[a] complete

record has been established upon which the Commission can deliberate and make its decision.”).

The Commission should finish what the IPTA started and adopt the Proposed Order.

D. If Voluntary Dismissal Were Granted, It Should Be With Prejudice

Finally, even if voluntary dismissal were granted, it should be granted with prejudice in order to prevent the IPTA from later re-filing the same claim at the Commission. As the Proposed Order recognizes, the IPTA has no legal support for its claim, which is barred by Illinois law, the statute of limitations, and several doctrines of finality. Unless any voluntary dismissal is made with prejudice, however, the risk remains that the IPTA will try to re-file its claim at the Commission later – a result that would unfairly prejudice AT&T Illinois by having to litigate the same issue yet again. The one thing the IPTA cannot be allowed to do is simply jettison this case when things look bad and then expect to be free to come back with the same frivolous claim later.

* * *

For all of these reasons, the IPTA’s Motion to Withdraw should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby states that he caused copies of the foregoing document to be served electronically on the following persons on November 13, 2015.

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